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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 15

CLARENCE DEBACKER,

Appellant,

vs.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

REPLY BRIEF FOR APPELLANT

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MISCELLANEOUS:

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Summary of Argument

I.

The fact that *Duncan* v. *Louisiana,* 391 U.S. 145, and *Bloom* v. *Illinois,* 391 U.S. 194, are not retroactive is not an impediment to this Court's deciding that jury trial is to be extended to serious juvenile cases. None of the judges of the Nebraska Supreme Court rested their opinion on the non-retroactivity of *Duncan. DeStefano* v. *Woods,* 392 U.S. 631, was a criminal case and had nothing to do with whether juvenile court "adjudications" are in fact convictions.

II.

No convincing argument has been advanced that juveniles should be deprived of jury trial. Juries are fundamental to the American scheme of justice because of the protection afforded against oppression by the government.

Lawyers for adults routinely decide whether to demand or forego jury trial according to the exigencies of the case and their knowledge of the idiosyncrasies of the trial judge. Juveniles are certainly entitled to a lawyer who does not have one hand tied behind him.

Not all juvenile court judges believe that juveniles are entitled to a watered-down Constitution. Some juvenile court judges in the midst of the problems posed by the rising of juvenile crime believe that the full scale application of due process will be beneficial.

III.

No argument can obscure the fact that appellant has been transferred from the training school and is now in a penal institution. Such a result cannot be called anything other than incarceration for crime. Euphemisms cannot disguise the fact that the juvenile court process is a criminal one when the juvenile is charged with the commission of a felony.

The Constitution was designed to endure through the problems of society and the fact that juvenile crime has become a major problem is no justification for scrapping the vital provisions of a Constitution that endured through a civil war.

ARGUMENT

I.

The Prospective Application of Duncan and Bloom Does Not Proscribe the Application of Their Principles Here.

The National Council of Juvenile Court judges asserts it appears here "solely for the purpose of attempting to present the collective knowledge and experience of its members on issues of obvious importance to the future operation and development of juvenile court justice in the United States."[1] It also says that it has "become the practice of juvenile court judges to seek to place at the service of legislatures and courts of last resort their collective knowledge and experience, in the hope of illuminating areas which are not always fully understood by attorneys, most of whom rarely practice in the juvenile court."[2] Since the "collective knowledge and experience" of some juvenile court judges[3] leads them to conclude that juries are not for juveniles, contrary to the judgment of many attorneys for juveniles who have repeatedly voiced demands for a jury trial in many jurisdictions, it would seem that the Council would present a cogent and persuasive argument demonstrating that the virtues of juvenile court rehabilitation outweigh the obvious injustice of denying a juvenile trial by jury when he and his attorney feel that it is in his best

[1] Council's brief, p. 3.

[2] *Id.*, p. 2.

[3] There is no indication that the Council represents anything like a majority of the juvenile court judges of this country or that the views of juvenile court judges generally are in accord with those of the Council.

interests. Instead of such an argument, the Council urges the Court not to let the other shoe drop.

None of the judges of the Nebraska Supreme Court thought the prospective application of *Duncan*[4] or *Bloom*[5] presented any problem. The majority applied the principles of *Duncan* (A. 29) and the prevailing minority distinguished it on the ground that *Duncan* was a criminal appeal in which the question of delinquency under a juvenile court act was not involved (A. 38). No good reason has been suggested that this Court should be more restrained than the Nebraska Supreme Court in applying the principles of *Duncan* and *Bloom* to the question of whether juries are required in juvenile delinquency proceedings leading to commitment to a state institution. In any event, *DeStefano*[6] does not stand in the way of a determination of the vital issue presented here.

Petitioner Carcerano[7] presented his contention (that Oregon's nonunanimity rule violated the Federal Constitution) in post-conviction proceedings and did not raise it on direct review. Carcerano's case was a criminal case as of course was Duncan's. Petitioner Stefano had been found guilty of criminal contempt as had Bloom. Although we assert that DeBacker's case is governed by the principles of *Duncan* and *Bloom*, DeBacker's case will not be a criminal case so far as the Sixth Amendment right to jury trial is concerned until this Court so holds. If this Court does so hold, it can announce, in this case or in another

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[4] 391 U.S. 145.

[5] 391 U.S. 194.

[6] 392 U.S. 631.

[7] Carcerano's case was decided with DeStefano's.

case which presents the question, whether the *DeBacker* holding is to be retroactive.[8] This court said in *DeStefano* that it would not "reverse state convictions for failure to grant jury trial where trials began prior to May 20, 1968 * * *." This holding has nothing to do with whether juvenile court "adjudications" are in fact convictions.

II.

Fundamental Fairness Does Require the Right of a Jury Trial Where Imprisonment of Four or More Years Can Result.

Duncan made clear that the right to be tried by a jury is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge".[9] Surely even the Council in its proposed "standard of fairness to the juvenile within the total context of the juvenile court's quest for the rehabilitative ideal" [10] (whatever that means!), would wish to protect a juvenile against such a prosecutor or judge. If the judges of the Council do not believe that fairness to the juvenile should include such protection, then a better argument could hardly be made for the necessity of placing juries between them and the juveniles in their courts.

The Council asserts the existence of an "understanding that there is a rational basis for procedural differences between juveniles charged with crime and their adult

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[8] We take no position on whether a decision extending jury trial to serious juvenile cases should apply prospectively only.

[9] 391 U.S. 145 at 156.

[10] Council's brief, p. 31.

counterpart."[11] The Council goes on to say that "juveniles are at an age when the enticements of crime are most alluring, when their sense of right and wrong is at its peak, and when their susceptibility to reform is the greatest."[12]

Without stating the basis for the alleged "understanding" that procedural differences between juveniles and adults charged with crime are called for, the Council vaults to a naked conclusion that "(These) sociological and psychological findings, among others, gave birth to, and still justified, the less formalistic procedural functioning of the juvenile court."[13] The Council says nothing to indicate that the availability of jury trial will interfere with the juvenile court's "quest for the rehabilitative ideal" unless of course the Council's idea of the "rehabilitative ideal" does not include a recognition of the juvenile's right to resist, by any legitimate methods his counsel deem appropriate, the imposition of compulsory rehabilitation.

The Council concedes that "some juvenile judges are bound to be insensitive" and asserts that "others are equally certain to be compassionate and experienced."[14] The Council of course does not know which of its juvenile judges are insensitive, but the attorney for the juvenile is apt to be acutely aware of the qualities of his local juvenile judge and the Council does not state any reasons why a juvenile's attorney, faced with an insensitive judge, should not be allowed to demand a jury. Deciding whether or not to waive a jury is a routine professional decision frequently made by experienced attorneys familiar with

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[11] *Id.*, p. 30.

[12] *Id.*, p. 30.

[13] *Id.*, p. 30.

[14] *Id.*, p. 36.

the local courts and the facts and circumstances of the case involving their particular client. The Council gives no reason why a juvenile is not entitled to all of the professional skill and judgment of his attorney, or why a juvenile's attorney cannot utilize the same legitimate techniques in the defense of a juvenile case as he would in the defense of an adult.

The Council says the "seriousness of the offense is a relevant gauge of the expansiveness of the due process requirements which must control."[15] It is pointed out that appellant's maximum sentence as a juvenile would be four years and that the maximum sentence if he had been tried as an adult would be twenty years. The Council recognizes that *Duncan* indicates that six months is the dividing line between a serious and petty offense but asserts that *Duncan's* standard is inappropriate in a juvenile court. In support Council argues that "confinement is not the only measure that the community uses to illumine its view of the seriousness of an offense."[16] Council does not, however, point out any measures besides confinement used by the community to determine the seriousness of an offense and the individual confined doubtless uses no other measure than the length of his confinement in assessing his view of the seriousness of the offense.

The Council uses the usual argumentative technique of viewing with alarm the possible proliferation of collateral issues not remotely involved in but alleged to be the inevitable accompaniment of a decision one seeks to avoid. Council is concerned that if a juvenile has a right to a jury trial he may not be able to waive it. The books are

[15] *Id.*, p. 37.

[16] *Id.*, p. 37.

full of decisions on the waiver of constitutional rights and this should present no earth-shaking problem. Council's concern as to how jurors are to be selected, challenged and instructed[17] can be laid to rest by legislatures under the control of the judiciary if constitutional limits be transcended. If more troublesome questions exist, this Court sits to resolve them.

Appellant's doubt that the Council's position is that of the typical juvenile court judge is reinforced by the comments of individual juvenile court judges. A distinguished judge, Orman W. Ketcham, Associate Judge, Juvenile Court of the District of Columbia, addressed himself to "The Effects of Due Process on the Juvenile Offender."[18] Judge Ketcham opened his paper by saying:

> "Our difficulty really lies in how to achieve due process of law for juveniles—not whether it is beneficial. I really couldn't live with myself as a judge if I didn't believe that fairness and justice were *always* a positive value. The wonder is that due process of law was largely denied to juveniles under the guise of the parens patriae doctrine, for more than half a century."

Judge Ketcham noted that a juvenile is entitled to a trial by "an impartial trier of the facts" and "this means either an unbiased judge or a jury of his peers."

Judge Ketcham's observations on the type of arguments made by the Council are illuminating. He states:

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[17] *Id.*, p. 38.

[18] Released at National Institute on Crime and Delinquency. Statler-Hilton, Boston, Mass., June 9, 1969.

"Many cries of havoc have emanated from judges, administrators and social workers in juvenile courts concerning the new and time-consuming burdens that the provision of due process of law for juveniles has occasioned. But the substance of our law should not be dependent upon the administrative convenience of our court system. In most urban courts today the time devoted to a juvenile's case has become notoriously short. New procedures required by *Gault* will now assure the juvenile a larger segment of his 'day in court.'

"Those who expound the 'parens patriae' philosophy believe that the introduction of due process of law will diminish the informality which has been the juvenile court's hallmark and circumscribe the discretion of the juvenile court judge. True. But those features have been tried and found wanting.

"Today's topic for discussion is the effect of the introduction of these procedures upon the juvenile himself, rather than their effect upon the juvenile justice system or its philosophy.

"The first result of the advent of due process is to assure the juvenile a judicial hearing the outcome of which is *NOT* foreordained. It used to be the boast of the most jingoistic members of the 'father knows best' philosophy that less than one-tenth of one percent of all juveniles charged ever denied their offenses. Such sudden candor and contrition from antisocial and alienated youth is so unbelievable that I submit that juveniles accused of offenses in such courts were never given any opportunity to deny the charges. The presumption of their guilt was well nigh irrebuttable. (The title for this panel discussion unconsciously expresses this characteristic approach by calling the subjects 'juvenile offenders' even before adjudication.)

"In our American system we take pride in operating a government of laws, not of men. To set an example of this principle, due process of law should afford the juvenile the opportunity to dispute the factual assertions of policemen, school teachers, social workers and even his parents. This is granted not because all such adults are untrustworthy, but because some are. After a fair and impartial judicial hearing, if the allegations are not accurate, the juvenile has been vindicated through a system of justice which rates high in his esteem. If the facts of the charge are correct, their careful establishment by legal rules will usually convince the juvenile that truth and justice are immutable, rather than dependent upon his cooperation or lack of it. Either way I believe that providing a juvenile with his proper day in court is a very therapeutic process which builds respect for law and justice. * * *.

* * * * *

"At a time in our history when public confidence in the law seems to be declining, it is important that our youth—more than a third of our population is under 21—should be educated in fair legal procedures by the operation of due process of law within our juvenile justice system. A juvenile who is given effective assistance by his attorney will have the entire legal process explained and interpreted to him—the pre-adjudication process, the trial, the judge's decision and the dispositional decree. This should, and usually does, enhance the understanding of the youth and his parents for our judicial system and the law of the land. The example of a juvenile court that operates under the restraint of due process of law may renew in our youth

respect for our law enforcement system and the judicial process.

"Before the advent of due process of law in the juvenile court, the only limit which the law placed upon the 'parens patriae' power of the judge was the requirement that he act in 'the best interests of the juvenile' —a highly subjective and almost unchallengeable maxim. Due process of law now substitutes established legal procedures for unbridled judicial discretion. Informality and the 'arm-around-the-shoulder' approach to juvenile justice is being replaced by an arm's-length, due process system of justice. Even adversary proceedings are available upon demand. The results should be less folksy, but lots fairer.

"The post-*Gault* system sharply diminishes the paternalistic attitude of juvenile courts, which has been so hated by a majority of youth. Instead of a juvenile receiving justice (or leniency) as a matter of grace or adult 'noblesse oblige,' he is now entitled to the equal protection of the law just as an adult would be. An alienated juvenile will no longer be subject to arbitrary police or judicial control. He will be treated as a first-class citizen with a full measure of individual rights. Thus, there is emerging the principle that each young person is an individual entitled for his own sake to civil rights and equal justice under law. Instead of the dominant father and the dependent child prototypes, the new philosophical approach stresses both equal opportunity and equal responsibility for each juvenile. Since the stated goal of our socialization and maturation process is the creation of mutual respect between adult individuals, this new principle of equality may well lay the groundwork for good citizenship

which will last long after the relationship between probation officer and juvenile offender is forgotten. * * *

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"One of the canards most frequently stated about the introduction of due process of law into juvenile courts is that the juvenile is prevented from receiving the rehabilitative treatment he needs to save him from a criminal career. This is like the well-known, but improper, question 'When did you stop beating your wife?' It begs several questions.

"As an attorney for such a juvenile there are three vital subsidiary questions to be asked before answering the ultimate one:

1. Has the juvenile actually done the offense which is supposed to demonstrate his need for rehabilitation?

2. If he has done the offense, is there a recognized behavioral science procedure or treatment that will correct his fault and save him from a criminal career?

3. If he has done the offense and there is a recognized treatment, can the juvenile court before which he will appear provide such treatment?

"If the answer to these three questions is 'Yes', most lawyers will persuade the juvenile to acknowledge the offense and submit to the jurisdiction of the juvenile court. If any of the answers are negative, the attorney should not 'throw the juvenile upon the mercy of the court.' To protect his client's interest, he should contest the court's jurisdiction.

"Immediately there comes to mind the juvenile who, in the eyes of his attorney and any impartial observer,

did commit the offense but refuses to admit it. (This is much more characteristic than the case of the juvenile who admits his fault but whose attorney insists upon a trial.) In my opinion, the provision of due process of law for such a recalcitrant juvenile is most therapeutic. He should (and will if the police cooperate) be proven guilty of the crime despite his protestations of innocence. He will have had his day in court and have learned that law enforcement can and does arrive at the truth by fair but effective procedures. He will, I believe, be several steps further down the road to rehabilitation than if he had—for the administrative convenience of the judiciary—been persuaded against his wishes to admit the offense and forgo his day in court.

"To sum up in one sentence: I am firmly convinced that the extension of due process of law to juveniles—however burdensome or inconvenient it may be to police, social workers, judges and juvenile court personnel—is an unmitigated benefit to the juveniles concerned."

Professor Monrad G. Paulsen,[19] a frequent commentator on juvenile law, says: "Due process, if it is such a precious gift, should not be withheld from children."[20] Paulsen quotes Mr. Justice Frankfurter: "The history of American freedom is, in no small measure, the history of procedure."[21]

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[19] Professor of Law, Columbia University.

[20] The 1967 Supreme Court Review, "The Constitutional Domestication of the Juvenile Court", p. 241.

[21] *Malinski* v. *New York*, 324 U.S. 401, 414 (1945).

Paulsen notes that Judge Julian Mack's 1909 concept of the juvenile court as being one which furnished kindly assistance is not particularly applicable today.[22] He says:

> "This perception of the juvenile court sees an institution designed for a fraternal community in which substantially all persons are either members or pledges. This is not the situation in the crisis-ridden cities of today. The problems of the slum-bred delinquent will not yield to 'kindly assistance.' District Judge Constance Motley has described the children who most often are involved in school suspension hearings: 'Members of "multi-problem families" * * * the new aliens in our midst—the urban pool * * * These children emerge, in the main, from the quagmire of urban poverty * * * '".

Paulsen further observes that:

> "Divisions in the urban community are deep. Formal procedure, to some extent, may be able to dispel mistrust. The judge who is supplied with specific rules regarding the fundamentals of fairness and who follows them may lessen the tensions that both he and the respondents feel. The adversary system that many see as a machine to sow discord does give the dispossessed a voice, and a time and place to be heard, and may offer a sense of participation in the decision-making that can affect respondents mightily. Ironically, the adversary system may provide some badly needed glue for the preservation of unity."[23]

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[22] N. 20 *Id.* at 242.

[23] N. 20 *Id.* at 243.

III.

The Reasonable Doubt Standard Must Be Applied in Juvenile Court When the Commission of a Felony Is in Issue Unless the "Civil" Label Is to Be Revitalized.

On July 23, 1969, the Texas Supreme Court in *Santana* v. *State,* No. B-1132, 5 Cr.L. 2400, overturned the decision of the Texas Court of Civil Appeals[24] that the reasonable doubt standard is required in juvenile proceedings. Justice Pope, joined by Justices Smith and Steakley, dissented, noting that:

> "In proper perspective, '* * * courts do not solve problems; they resolve issues. As long as it remains a court, the juvenile court must be limited to this role.' Tenney, The Utopian World of Juvenile Courts, Vol. 383, the annals of the American Academy of Political and Social Science."[25]

Justice Pope pointed out that the criticism of the juvenile courts is not new, quoting Paul Tappen who wrote in 1949 in Juvenile Delinquency:

> "The presumption is commonly adopted that since the State has determined to protect and save its wards, it will do no injury to them through its diverse officials so that these children need no due process protections against injury. Several exposures to court; a jail remand of days, weeks, or even months; and a long period in a correctional school with young thieves; muggers, and murderers—these can do no conceivable harm if the State's purpose be beneficent and the pro-

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[24] 431 S.W. 2d 558 (1968).

[25] Dissenting opinion, p. 4.

cedure be 'chancery'. Children are adjudicated in this way every day without visible manifestations of due process. They are incarcerated. They become adult criminals, too, in thankless disregard of the State's good intentions as parens patriae." [26]

In similar vein, Justice Pope quoted Norval Morris, Professor of Law and Criminology at the University of Chicago, speaking at a program sponsored by The Institute of Continuing Legal Education, published in the volume entitled, Gault: What Now For The Juvenile Court? who said:

"What I have anxiety about are the reality problems which develop when these types of rescue operations become institutionalized. What happens is that rescue operations are likely to ignore the preferences of those who are to be rescued. * * * If an inquisitorial, non-adversary system is right for children, why is it not right for adults? If benevolence is what guides us, why should benevolence stop short with children? The case was not easy to make even before Gault, but certainly after Gault it is impossible." [27]

Justice Pope's conclusion is eloquent:

"Liberty is our real concern. Perhaps no greater harm could come to Santana than the State's misguided efforts to rehabilitate him if, in fact, he is innocent to begin with. His plea is that he wants fairness first; therapy second. With equal logic, one could have reasoned before Gault that the benefits of treatment accorded a juvenile are so helpful and beneficial to the

[26] *Id.*, p. 5.

[27] *Id.*, p. 5.

juvenile that the State can be careless in notifying him or his parents about the offense, or providing him a lawyer, or permitting hearsay from an absent complainant, or by tolerating his self-incrimination. The rights which Gault accords a juvenile reduce the chances for unfairness and injustice. The reason for the reasonable doubt rule is no different." [28]

Conclusion

The addiction to euphemisms is hard to cure. "Telling like it isn't" is the stock in trade of those who believe the end justifies the means. The founders of the Third Reich found it necessary to set up new tribunals, euphemistically designated as "People's Courts", when the existing judicial system was inadequate to the task of the rehabilitation of the political philosophies of those Germans who were reluctant to be led into the new tomorrow. Dictators have found it helpful to style themselves as "Liberator" and "Benefactor".

"* * * (The) law does not pivot on labels * * *." [29] and appellant's cell in the Nebraska State Reformatory is not labeled with an apartment number. The most ingenious arguments cannot obscure the simple fact that appellant has been transferred from the Training School to a penal institution and that he is there without benefit of jury trial or the criminal standard of proof.

This Court is told that the problem of juvenile crime is such that provisions of the Constitution should be suspended in an effort to solve it. Over a century ago this

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[28] *Id.*, p. 12.

[29] *Powell* v. *McCormack*, 395 F.2d 577, 592.

Court was likewise told that the problems of a Union torn by Civil War were such that Constitutional rights had to be suspended. Mr. Justice Davis' answer thunders down the corridors of history:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." [30]

Respectfully submitted,

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[30] *Ex parte Milligan*, 4 Wall. 2, 119-21.